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# Counter-terrorist detention and international human rights law

Fiona de Londras

## 1. INTRODUCTION

Ordinarily states only detain individuals involuntarily for reasons associated with pre-trial custody, post-conviction punishment, or the protection of individuals (as in relation to health). In these cases detention is primarily punitive or protective and only rarely or incidentally preventive. Counter-terrorist detention of the kind that this chapter is concerned with — namely, the detention of suspected terrorists as opposed to those convicted of terrorism offences — has a radically different character inasmuch as its purpose is *primarily* preventive.<sup>1</sup>

On a purely utilitarian level, suspected terrorists are detained to both prevent their own further engagement in terrorist activity and to acquire information or intelligence that might disrupt the involvement of others in terrorism. On a semantic level, however, suspected terrorists may be detained to manifest the coercive capacity of the threatened state. Particularly where the detention in question takes place in a manner that seems to challenge established elements of the rule of law, it may also aim to communicate clearly a state's willingness to do what it considers *necessary* to protect its polity and not 'merely' to do what is legally permissible.<sup>2</sup>

Thus counter-terrorist detention is of a qualitatively different character to other kinds of detention, although that is not to suggest that it is entirely *sui generis*. Certainly there are ways in which the character of counter-terrorist detention can be said to align with the detention of anti-establishment protesters, particularly in authoritarian or dictatorial states. That said, the important point in the context of this chapter is to note from the outset that there is something particular about the nature of counter-terrorist detention.

The particular character of counter-terrorism means that detention is very often administrative in nature. Administrative detention can be broadly defined as detention that is (i) done under executive authority and without legislative mandate; or (ii) done pursuant to a legislative mandate but where the determination of who is to be detained is administrative; or (iii) both.

A recent example of the interaction between executive and legislative powers of detention is the United States' detention of suspected terrorists in Guantánamo Bay, Cuba, after 9/11. Prior to the introduction of a clear legislative basis, detention of suspected terrorists there was clearly administrative because it was done on executive authority and the determination of who was to be detained was administrative in

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<sup>1</sup> On the extraordinariness of counter-terrorist detention see F de Londras, 'Prevention, detention and extraordinariness' in F ní Aoláin and O Gross (eds), *Guantánamo Bay and Beyond Exceptional Courts and Military Commissions In Comparative and Policy Perspective* (CUP, 2013).

<sup>2</sup> On semantics and the 'War on Terror' see I Ward, *Law, Text, Terror* (CUP, 2009).

nature (that is, not determined as a result of a judicial or quasi-judicial process).<sup>3</sup> Even after the introduction of legislative authority in the US' Detainee Treatment Act of 2005, however, detention remained administrative because detainees were identified by administrative processes. Even after a detainee might have successfully engaged in judicial (habeas corpus) or quasi-judicial (Combatant Status Review Tribunal) processes, detention could be continued by means of an administrative decision not to release. Although the US is by no means the only state to have engaged in administrative counter-terrorist detention of this nature, either since September 2001 or beforehand, it demonstrates well the particularity of counter-terrorist detention, albeit in a context also governed by international humanitarian law.

This chapter outlines the international legal regime governing detention from the starting point that what is protected in international law is not a right to be free from detention per se but rather a right to be free from the arbitrary deprivation of one's liberty.<sup>4</sup> This is clearly rooted in international human rights law, which is the main focus of this chapter (acknowledging that it interacts with international humanitarian law in situations of armed conflict). The chapter proceeds by considering, first, the relevance of international human rights law to counter-terrorist detention, and then the human rights standards relevant to such detention across four axes: (i) the concept of detention; (ii) the acceptability of preventiveness; (iii) the provision of review; and (iv) detention in the context of a declared emergency. By means of this analysis, the chapter demonstrates that counter-terrorist detention can be compatible with the standards of international human rights law as they have been interpreted and applied in the past decade, but that in the process of such interpretation and application those standards have at times been diluted to a worrying extent.

## 2. THE RELEVANCE OF INTERNATIONAL HUMAN RIGHTS LAW

The decision to focus on international human rights law in this chapter requires some preliminary justification. Although contemporary counter-terrorism has an increasingly transnational character, a vast amount of counter-terrorist law, policy and action continues to be formulated and executed on the domestic level. This does not, however, make international law irrelevant to such processes and policies. International legal principles have the capacity to shape the parameters of legal possibility at the domestic level in the context of counter-terrorism just as they do in other contexts. In every field of activity, states are constantly aware of their international legal obligations, which in turn have the capacity to outline hard lines of legal possibility restricting desired state action. Although states may exceed those

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<sup>3</sup> President George W Bush, *Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed Reg 57833 (16 November 2001).

<sup>4</sup> International Covenant on Civil and Political Rights, adopted 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'), art 9; Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('ECHR'), art 5; American Convention on Human Rights, 'Pact of San José, Costa Rica', adopted 22 November 1969, 1144 UNTS 144 (entered into force 18 July 1978) ('ACHR'), art 7.

boundaries, they do so cognisant of the fact that their actions may put them in conflict with dominant understandings of their international legal obligations.

This is not to suggest that states do not challenge international law in the counter-terrorist context. For example, I have previously written of both external and internal challenges to international human rights law that have emerged in the contemporary counter-terrorist context.<sup>5</sup> External challenges are ones that deny the relevance or applicability of international human rights law to counter-terrorist activity undertaken abroad and/or in the context of armed conflict. Internal challenges are ones where the relevance of international human rights law is accepted yet states attempt, through engagement, to recalibrate human rights standards downwards to permit more extensive state action.

Not even an external challenge, however, prevents the applicability of international human rights law as a doctrinal matter. Indeed, in spite of these challenges, after 9/11 even states that would have preferred international standards to be different (and more permissive of state action) did not turn away from international law; rather they continued to engage with it in a way that suggests its resilience in the face of counter-terrorist challenges.<sup>6</sup>

The relevance of international human rights law in this context is further illustrated by the fact that NGOs and activists will often use it as the benchmark against which to critique counter-terrorist policies in political fora. This is so even where human rights law might not be of much domestic legal utility because, for example, it has not been incorporated into domestic law in a dualist state. International human rights law is thus used as a lever to try to adjust state practice, including in relation to counter-terrorist detention.

Furthermore, international processes such as the Universal Periodic Review and state reporting processes to other UN treaty bodies are frequently engaged by civil society to identify perceived difficulties with counter-terrorist policies, including detention, from a rule of law perspective. In these processes, international legal standards are the ones against which state action is measured. In addition, when individual detainees challenge their detention they often do so by reference to international legal standards, either as part of the case put in domestic courts or in making complaints to international institutions such as the European Court of Human Rights (ECtHR) or the UN Human Rights Committee.

It is, then, abundantly clear that international human rights law has a role to play in relation to counter-terrorist detention. International human rights law is constantly applicable; the fact that a state is experiencing a period of terrorist threat that it considers requires, *inter alia*, counter-terrorist detention does not mean that international human rights law loses its relevance. It may apply in a slightly different manner (as addressed below, this body of law has structures in place to deal with emergency situations) but it always applies. The same is true where a campaign of

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<sup>5</sup> F de Londras, *Detention in the 'War on Terror': Can Human Rights Fight Back?* (CUP 2011) Ch 3 (characterising the US as mounting an external challenge and the UK as mounting an internal challenge).

<sup>6</sup> *Ibid.*

counter-terrorism takes the form of an armed conflict that engages international humanitarian law. International human rights law will apply in those circumstances in accordance with the principles of *lex specialis* and is not excluded.<sup>7</sup> It is, thus, to international human rights law that we now turn.

### 3. INTERNATIONAL HUMAN RIGHTS LAW AND COUNTER-TERRORIST DETENTION

When assessing the international human rights law boundaries of acceptable counter-terrorist action, one must first recognise that the precise limits imposed by international human rights law will depend on whether or not a state has derogated from particular human rights standards. As considered in more detail below, where a state declares an ‘emergency’ as a result of a terrorist threat, derogating measures relating to detention can be introduced. However, even if no emergency is declared and there is no derogation, the international human rights system recognises the challenge of confronting a terrorist threat and takes a flexible approach. The extent to which relevant international human rights standards take surrounding circumstances and context into account, even without a state having derogated from the relevant standards, is outlined in the forthcoming sections.

#### A. The Concept of Detention in International Human Rights Law

In the post-9/11 context two different approaches to depriving suspected terrorists of liberty have emerged. The first is ‘traditional’ detention — literally locking people up and confining them to a cell, prison or detention centre. In these cases there is no doubt that a deprivation of liberty exists and the international standards relating to the right to be free from arbitrary detention are engaged.

The second form of detention, however, is less traditional. It involves the imposition of orders — usually through some kind of civil law process — that are highly coercive and greatly limit the individual’s freedoms, including freedom of movement, freedom to communicate, capacity to earn a living, and so forth. The United Kingdom has been a particularly prominent exponent of this approach to counter-terrorist quasi-detention, first with ‘control orders’ and now with terrorism prevention and investigation measures (TPIMs).<sup>8</sup>

The quandary for international human rights law with regard to these kinds of orders is whether or not they constitute detention per se. If they do, then the relevant standard is the right to be free from arbitrary detention, with an associated right to challenge the lawfulness of detention; if not, then this standard is not engaged. Whether or not any particular order constitutes detention is essentially a matter of degree. Indeed, this reflects the view of the ECtHR in *Guzzardi v Italy* that

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<sup>7</sup> See, e.g., *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226.

<sup>8</sup> For a comprehensive overview see C Walker, *Terrorism and the Law* (OUP 2011).

deprivation of liberty is essentially a matter of ‘degree or intensity, and not one of nature or substance’.<sup>9</sup>

Thus, the first point of significance is that what some experience as counter-terrorist (quasi-) detention may not in fact engage the international human rights standards relevant to detention *per se*.<sup>10</sup> This is itself a matter of some concern, for states are now innovating measures that constitute quasi-detention in a manner that allow for substantial restrictions on liberty but which may avoid categorisation as detention. They may thus engage other standards that do not, for example, afford a person the same right to challenge the lawfulness of the measures as a detainee enjoys (considered further below). These measures are clearly designed to have the same preventive effects as counter-terrorist detention, and can infringe very significantly on quality of life (both for the person under the order and their families and other cohabitants), but might not be governed by detention-related human rights standards.

## **B. The Acceptability of Preventive Detention**

As already noted, counter-terrorist detention is largely preventive in nature and this is the source of much rights-based criticism. Yet while international human rights law does not contemplate preventive detention as the core type of detention that a state might engage in, neither does it definitively prohibit it or regard it as unacceptable. Although some may find this controversial, the permissibility of preventive detention is clear from reference to the terms of international instruments and their interpretation by authoritative bodies.

Article 9 of the ICCPR has been interpreted to permit preventive detention in pursuit of legitimate public purposes such as ‘public security’<sup>11</sup> and subject to appropriate safeguards being in place.<sup>12</sup> Article 5(1)(c) of the ECHR allows for detention of an individual ‘for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence *or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so*’ (emphasis added), which suggests that preventive detention is permitted under that regime. In the context of prevention it is clear that the process surrounding the detention — and especially the capacity to effectively challenge its lawfulness — is key to the acceptability, from a legal perspective, of any particular detention regime. The capacity to challenge the lawfulness of detention is considered further below.

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<sup>9</sup> [1980] ECHR 5, [93].

<sup>10</sup> UK courts have considered whether control orders engage art 5 of the ECHR on a number of occasions and found that, in order to determine whether there has been a deprivation of liberty, the full range of restrictions imposed on the individual should be taken into account. Thus, for example, in *Secretary of State for the Home Department v JJ* [2007] UKHL 45 the court found that an 18-hour curfew combined with a number of other restrictions on communication was in fact more restrictive than detention in an open prison and clearly engaged art 5.

<sup>11</sup> UN Human Rights Committee, General Comment No. 8: Article 9 – Right to liberty and security of persons, UN Doc HRI/GEN/1/Rev.1 (30 June 1982), [4].

<sup>12</sup> *Ibid.*

### C. The Administrative Nature of Counter-terrorist Detention

Having established that the preventive nature of counter-terrorist detention does not render it *necessarily* incompatible with international human rights law we can now turn our attention to its frequently administrative nature. This seems to rub uncomfortably against the general requirement that detention be lawful, inasmuch as that might be taken to mean that it is done on the basis of a properly ‘promulgated’ law.<sup>13</sup> Where the detention power finds its basis in legislation that law must, of course, be promulgated according to the constitutional and other requirements of valid law-making in the relevant state. However, a detention power need not have a legislative basis to be *prima facie* non-arbitrary; one must first pay attention to how detention powers are organised within the domestic legal system

Some domestic legal systems permit executive powers of detention (including where such executive power arises under a state’s constitution, in which case it may be duly ‘promulgated’). Such detention might enjoy a presumption of non-arbitrariness if it is subject to at least some kind of limitation as well as an effective checking mechanism. The ECtHR has found that the provision of an ‘unfettered power’ of detention to the Executive is not compatible with non-arbitrariness.<sup>14</sup> Detention powers must not therefore be overly vague or uncertain in scope.

Further, even where there is an administrative measure of indefinite duration the UN Working Group on Arbitrary Detention has suggested that the provision of safeguards and the deduction of its duration from subsequent time to be served as a result of a criminal conviction are factors that can lead to the detention being non-arbitrary.<sup>15</sup> Thus, the mere fact of counter-terrorist detention being administrative does not *in itself* make it incompatible with international human rights law.

### D. The Capacity to Challenge the Lawfulness of One’s Detention

The key to a true assessment of how well human rights law protects individual liberty in the counter-terrorist context is the capacity of a detainee to challenge the lawfulness of detention. It is this capacity — and the provision of a rigorous process to facilitate it — that provides the core safeguard from arbitrary counter-terrorist detention. Thus, most international human rights law instruments require that individuals who are subjected to detention are informed of the basis of their detention and have the capacity to challenge its lawfulness.<sup>16</sup> International human rights law requires that a judge or court is able to assess compliance with procedural

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<sup>13</sup> *Maestri v Italy* (2004) 39 EHRR 38.

<sup>14</sup> *Ibid* [30].

<sup>15</sup> Working Group on Arbitrary Detention, *Civil and Political Rights, including Questions of Torture and Detention*, UN Doc E/CN.4/1999/63 (18 December 1998).

<sup>16</sup> ICCPR, art 9(2), (4); ECHR, art 5(4); ACHR, art 7(4), (6).

requirements in domestic law, the reasonableness of the suspicion that forms the basis for the detention, and the legitimacy of the purpose of detention.<sup>17</sup>

The precise requirements for particular review mechanisms vary in terms of degree depending on the prevailing circumstances. As held by the ECtHR in *Bouamar v Belgium*, ‘the scope of the obligation ... is not identical in all circumstances or for every kind of deprivation of liberty’.<sup>18</sup> So, although international law requires that a detainee have the opportunity to mount a challenge before a ‘court’, this term should be taken to mean that the procedure followed must have a judicial character and give to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question.<sup>19</sup> The authority hearing the challenge must be capable of ordering the release of the detainee<sup>20</sup> and should be ‘independent, objective and impartial in relation to the issues dealt with’.<sup>21</sup>

Thus, while international law appears to require that detainees are provided with an adversarial procedure<sup>22</sup> in which they can participate (or be represented by an advocate),<sup>23</sup> the exact format of that procedure will depend on the circumstances of the case. Where, as in contemporary counter-terrorist contexts, there are particular concerns relating to protecting intelligence information and evidence etc, states enjoy some flexibility around process, disclosure and representation of detainees, although at the very least the ‘gist’ of the state’s basis for detaining the individual in question must be disclosed to him or her.<sup>24</sup> This flexibility will also be applied to the definition of the required ‘speedy’ review of the lawfulness of detention, although the positive obligation to arrange the legal system to ensure that petitions are considered promptly once they have been lodged remains in force.<sup>25</sup>

Fundamentally, however, the challenge must have the capacity for effectiveness: it must be able to secure the release of the detainee should he or she be successful in the claim. As we have seen throughout the past decade of counter-terrorist detention, this has been a significant weakness in the review processes put in place to deal with detained suspected terrorists. In Guantánamo Bay, the Combatant Status Review Tribunals and Administrative Detention Reviews have both determined that some

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<sup>17</sup> This is deduced from the requirements in ECHR, art 5(4) that detainees ‘shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful’ and the almost identical wordings of ICCPR, art 9(4), ACHR, art 7(6), Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms, adopted 26 May 1995 (entered into force 11 August 1998), art 5(3).

<sup>18</sup> (1988) 11 EHRR 1, [60].

<sup>19</sup> Ibid [57].

<sup>20</sup> UN Human Rights Committee, *Shafiq v Australia*, Communication No 1324/2004, UN Doc CCPR/C/88/D/1324/2004 (13 November 2006).

<sup>21</sup> UN Human Rights Committee, *Saimijon & Bazaro v Uzbekistan*, Communication No 959/2000, UN Doc CCPR/C/87/959/2000 (8 August 2006) [8.3]; UN Human Rights Committee, *Kulomin v Hungary*, Communication No 321/1992, UN Doc CCPR/C/50/D/521/1992 (22 March 1996) [11.3].

<sup>22</sup> *Sanchez-Reisse v Switzerland* (1986) 9 EHRR 71.

<sup>23</sup> *Toth v Austria* (1991) 14 EHRR 551; UN Human Rights Committee, *Bousroual v Algeria*, Communication No 992/2001, UN Doc CCPR/C/86/D/992/2001 (24 April 2006); UN Human Rights Committee, *de Morais v Angola*, Communication No 1128/2002, UN Doc CCPR/C/83/D/2002 (18 April 2005).

<sup>24</sup> *A & Others v United Kingdom* (2009) 49 EHRR 29.

<sup>25</sup> See, e.g., *E v Norway* (1990) 17 EHRR 30.



detainees do not require continued detention, as has the Task Force established by President Obama to review the closure of the base,<sup>26</sup> yet dozens of such individuals remain in detention. This is ostensibly because of the challenges in returning them to states where they face a real risk of torture or inhuman treatment (in the case of Uighur detainees) or because the security situation is too unstable to address security concerns should detainees be returned there (in the case of Yemeni detainees).<sup>27</sup>

Similarly, in the UK the House of Lords' decision finding that indefinite detention in Belmarsh Prison pursuant to Part 4 of the Anti-Terrorism Crime and Security Act 2001 (UK) was incompatible with human rights<sup>28</sup> did not result in liberty for the detainees but rather the introduction of control orders,<sup>29</sup> since replaced by TPIMs.<sup>30</sup>

In other words, on a systemic level one sort of detention has been replaced with another (albeit less extreme) deprivation of liberty. One might justifiably question whether that is a meaningful improvement, or simply demonstrates the capacity of a desired government policy (to control individuals in a manner that will prevent them from engaging in terrorist activity) to be shoehorned into a form that might comply with human rights *law* but leaves individuals subjected to deeply troubling and intrusive measures in real terms.<sup>31</sup>

#### 4. COUNTER-TERRORIST DETENTION IN A DECLARED EMERGENCY

In cases where states design and execute their counter-terrorist detention policy in a declared emergency context, the international human rights law regime that applies is altered. An emergency that threatens the life of the nation can be declared, leading to derogation from the detention provisions of the relevant instrument.<sup>32</sup> Derogation permits a reduced level of rights protection and enhances the state's capacity to take actions oriented at confronting the perceived threat.

Perhaps surprisingly, there have been relatively few derogations to permit counter-terrorist detention in the post-9/11 context. The US has not derogated from its international obligations relating to the right to be free from arbitrary detention to facilitate its current and extensive counter-terrorist detention programme, no doubt reflecting the US's position that international human rights law does not apply extra-territorially (but only within a state's own territory<sup>33</sup>) and in the context of a global

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<sup>26</sup> A full account is provided in US Guantánamo Review Task Force, *Final Report* (22 January 2010).

<sup>27</sup> *Ibid.*

<sup>28</sup> *A & Others v Secretary of State for the Home Department* [2005] 2 AC 68 ('Belmarsh Case').

<sup>29</sup> See Prevention of Terrorism Act 2005 (UK).

<sup>30</sup> See Terrorism Prevention and Investigation Measures Act 2011 (UK).

<sup>31</sup> For more on the inadequacy of human rights *law* to ensure human rights *enjoyment* in this context see, e.g., L Zedner, 'Preventive justice or pre-punishment? The case of control orders' (2007) 60 *Current Legal Problems* 174.

<sup>32</sup> ICCPR, art 4; ECHR, art 15; ACHR, art 27. The concept of emergency is one on which there is little consensus, but that debate is beyond the scope of this chapter. For the classical account see J Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency* (University of Pennsylvania Press, 1994).

<sup>33</sup> On the claim that international human rights law obligations do not apply extra-territorially see, e.g., US Department of State, *The United States' Oral Response to the Questions asked by the Committee Against Torture* (8 May 2006) <<http://www.state.gov/j/drl/rls/68562.htm>>.

armed conflict against terrorist groups (as the US also initially claimed that such groups were not covered by international humanitarian law).<sup>34</sup>

In Europe the UK is the only state to have declared an emergency and derogate in direct reaction to the attacks of 11 September 2001, although that derogation no longer remains in force.<sup>35</sup> In the *Belmarsh case*, in 2004 the UK House of Lords accepted that the threat of contemporary transnational terrorism by Al Qaeda was sufficiently grave to constitute a ‘public emergency’ threatening the life of the United Kingdom, although a number of judges dissented.<sup>36</sup> Other states have also occasionally derogated from their human rights obligations in other contexts than the immediate Al-Qaeda-related threat after 9/11.<sup>37</sup>

Where a state derogates, the right to be free from arbitrary detention can be varied but it cannot be entirely suspended; as outlined below protections against arbitrariness remain, including the right to challenge the lawfulness of detention. Thus, a state may be permitted to hold people suspected of involvement in terrorism for a longer period of time prior to charge or trial than normal, or on a lower standard of proof than would usually be expected. However, conscious of the vulnerabilities that are experienced in detention, international institutions have required that the right to challenge the lawfulness of one’s detention remains in force *even when* a state has derogated.<sup>38</sup> Perhaps the strongest statement of this is the *Advisory Opinion on Habeas Corpus in Emergency Situations* issued by the Inter-American Court of Human Rights in 1987.<sup>39</sup> There the Court held that habeas corpus (and *amparo*<sup>40</sup>) cannot be suspended in times of emergency as these judicial protections are essential guarantees of the protection of individual rights (including non-derogable rights such as the right to be free from torture) and central to the ‘effective exercise of

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<sup>34</sup> On the claim that these groups were not entitled to rights under international humanitarian law, see *ibid.*

<sup>35</sup> UK Derogation from Article 5 was communicated to the Secretary General of the Council of Europe by *note verbale* on 18 December 2001; see also The Human Rights Act 1998 (Designated Derogation) Order 2001. The derogation was lifted in 2005; see The Human Rights Act 1998 (Amendment) Order 2005.

<sup>36</sup> *Belmarsh Case*, above n 28.

<sup>37</sup> For a broad analysis of derogations in the case of terrorist violence see O Gross and F Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (CUP 2006), Ch 7.

<sup>38</sup> UN Human Rights Committee, *Alegre v Peru*, *Communication No 1126/2002*, UN Doc CCPR/C/85/D/1126/2002 (17 November 2005); Working Group on Arbitrary Detention, *Opinion No 11/2000*, UN Doc E/CN.4/2001/14/Add.1 (9 November 2000) 75 (‘*Eleuterio Zarate Luján v Peru*’). On a more general level, see UN Human Rights Committee, *General Comment No 29: Article 4 - States of Emergency*, UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001); UN Human Rights Committee, *Concluding Observations of the UN Human Rights Committee: Israel*, UN Doc CCPR/C/79/Add.93 (18 August 1998) [21]; *Recommendation by the Committee to the Sub-Commission on Prevention of Discrimination and Protection of Minorities concerning a draft third optional protocol to the Covenant*, UN Doc A/49/40 (vol I), annex XI, [2].

<sup>39</sup> *Advisory Opinion on Habeas Corpus in Emergency Situations* (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights (1987) IACtHR (Ser A) No 8, 11 EHRR 33 (‘*Advisory Opinion on Habeas Corpus*’).

<sup>40</sup> *Amparo* is a constitutional action common in Latin American countries by which an injunction can be acquired for the purposes of protecting constitutional rights.

representative democracy'.<sup>41</sup> While an emergency situation may necessitate a suspension of certain guarantees, the Court stressed that the rule of law or the principle of legality are never suspended; these continue to be the guiding principles for governance even in times of strain.<sup>42</sup> Judicial protections are an essential guarantee of the application of and respect for these principles, and habeas corpus is the means of guaranteeing protection from what international law recognises as among the most egregious human rights violations (as defined by *jus cogens* and non-derogable rights),<sup>43</sup> namely freedom from arbitrary detention. These protections have a particular importance in cases of emergency when some rights and freedoms might be suspended<sup>44</sup> and therefore may not be suspended themselves.

Although the ECtHR has never held that the right to challenge the lawfulness of one's detention is non-derogable, the provision of effective review mechanisms such as habeas corpus has been high on the Court's list of considerations when assessing whether counter-terrorist detention measures introduced pursuant to a derogation comply with Article 5. Thus, in assessing whether a pre-charge detention period is excessive, the Court will take into account the detainee's access to habeas corpus or equivalent proceedings; habeas corpus is seen as an 'effective safeguard ... which provided an important protection against arbitrary behaviour and incommunicado detention'.<sup>45</sup>

International human rights law's commitment to ensuring that the right to challenge the lawfulness of one's detention must be maintained does not mean that international institutions have ensured the *effectiveness* of review. It has already been noted that, absent a derogation, the precise standards that must be fulfilled to vindicate this right are variable depending on the circumstances. In the case of derogation and counter-terrorist detention, the 'surrounding circumstance' of (perceived or actual) terrorist violence is a potent one indeed, and can result in human rights standards being deemed satisfied by what appears to be quite unsatisfactory from an effectiveness perspective.

In its jurisprudence the ECtHR has tended to assert that the right to challenge the lawfulness of detention in Article 5(4) of the ECHR is satisfied by the mere provision of habeas corpus in law without considering whether, in a particular case or circumstance, the available proceedings provide substantive review before a neutral arbiter as required by international law. Thus, in *Ireland v United Kingdom* the Court considered the adequacy of habeas corpus in relation to internment in Northern Ireland.<sup>46</sup> Internment was subject to review by an advisory committee which did not

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<sup>41</sup> *Advisory Opinion on Habeas Corpus*, [20]; See also Charter of the Organization of American States, adopted 30 April 1948, 119 UNTS 3 (entered into force 13 December 1951) art 3.

<sup>42</sup> *Advisory Opinion on Habeas Corpus*, [24].

<sup>43</sup> *Ibid* [29], [35].

<sup>44</sup> *Ibid* [40].

<sup>45</sup> *Aksoy v Turkey* (1997) 23 EHRR 553, [82], referring to *Brannigan and McBride v United Kingdom* (1994) 17 EHRR 539. But see also the dissenting judgment of Walsh J in *Brannigan & McBride* at [7] where he cast significant doubt on the effectiveness of habeas corpus in emergency situations if compliance with international law could not successfully ground an application for release.

<sup>46</sup> (1978) 2 EHRR 25.

have the power to order release, but internees could enter habeas corpus petitions to the High Court of Justice in Northern Ireland challenging the detention only on the basis of *mala fides* on the part of the police officer whose recommendation resulted in the internment. Internees could not challenge the lawfulness of detention on the basis that the officer's suspicion was not reasonable. In spite of what appears to be the clear inadequacy of this review, the Court found that there had been no violation of Article 5(4) because habeas corpus petitions were available to an extent and in a manner considered appropriate to a situation of 'emergency' as defined by the derogation clause in Article 15 of the ECHR. The mechanisms for the review of the lawfulness of detention available in Northern Ireland would not have been considered appropriate in a time of normalcy, but *were* sufficient in this abnormal time. This was in spite of the fact that deprivation of liberty was widespread and susceptible to 'false positives' precisely because of this conflict-ridden state of affairs. From a rights-oriented perspective one would have expected at the least the same level of rigour in such reviews, even if the processes of review might have been somewhat altered.

A similar decision was reached in *Brogan v United Kingdom* where the ECtHR held that detention for just over four days violated Article 5 of the ECHR, but it did not find a violation of Article 5(4) as a result of the formal availability of habeas corpus to detainees.<sup>47</sup> This was notwithstanding the fact that detainees under the Prevention of Terrorism Act 1984 (UK) could be held virtually incommunicado for the first 48 hours,<sup>48</sup> had only limited access to counsel after that time,<sup>49</sup> and, even where a habeas corpus petition was mounted, precedent suggested that the potential for success was minimal.<sup>50</sup> Although *Fox, Campbell & Hartley v United Kingdom* was a welcome break from this trend (holding that where detention was based on suspicion, this required a capacity to challenge the reasonableness of that suspicion),<sup>51</sup> the Northern Ireland cases evidence an overwhelming acceptance by the Court that fairly shallow opportunities to challenge the lawfulness of detention were sufficient under the ECHR.

In the more recent cases on counter-terrorist detention the ECtHR has not injected much more rigour into its previous jurisprudence. Although in *A v United Kingdom* the Court held that the detention of non-UK citizens on the basis of Part 4 of the Anti-terrorism Crime and Security Act 2001 (UK) was not compatible with the ECHR, as it discriminated without justification between these individuals and UK citizens, it indicated that highly irregular review mechanisms could satisfy the Convention.<sup>52</sup>

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<sup>47</sup> (1988) 11 EHRR 117.

<sup>48</sup> Police and Criminal Evidence Act 1984 (UK), s 56(11)(b); Northern Ireland (Emergency Provisions) Act 1991 (UK), s 44(6).

<sup>49</sup> Police and Criminal Evidence Act 1984 (UK), s 58; Northern Ireland (Emergency Provisions) Act 1991 (UK), s 45.

<sup>50</sup> *Ex parte Lynch* [1980] Northern Ireland Law Reports 126; *Hanna v Chief Justice of the RUC* (1986) 13 Northern Ireland Judgments Bulletin 71; see also W Finnie, 'Rights of persons detained under the anti-terrorist legislation' (1982) 45 *Modern Law Review* 215.

<sup>51</sup> (1991) 13 EHRR 157.

<sup>52</sup> (2009) 49 EHRR 29.

A particular challenge in the context of counter-terrorism is how much information about the case against a suspected terrorist can be revealed to him or her (to allow the detainee to mount an effective challenge) without endangering national security (by compromising intelligence sources or methods). The UK's solution has been to appoint 'Special Advocates' where it is determined that material should remain closed. Special Advocates do not have traditional lawyer-client relationships with detainees, but rather are appointed from a security-cleared panel and cannot reveal the detail of the case to the detainee.<sup>53</sup> This clearly poses significant barriers to the development of an effective challenge against the decision to detain the individual.

In recognition of this, the ECtHR in *A v United Kingdom* held that in closed material procedures involving Special Advocates the detainee must still be 'provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate'.<sup>54</sup> This is now known as the 'gisting' requirement; the suspect must be told the 'gist' of the case against him and the provision of general assertions will not be sufficient. 'Gisting' does not however require that any significant level of detail be disclosed to the suspected terrorist, and it is not at all clear that this is sufficient to enable an effective and meaningful challenge to the lawfulness of detention, particularly because the Special Advocate cannot communicate with the detainee about the closed material that the advocate is able to see. Notwithstanding this, however, 'gisting' now seems to satisfy Article 5(4), demonstrating what appears to be a continuing commitment to legalism in place of effective rights protection.<sup>55</sup>

## 5. SOME REFLECTIONS ON COUNTER-TERRORIST DETENTION AND INTERNATIONAL HUMAN RIGHTS LAW

In the context of counter-terrorist detention, as in many other contexts, international human rights law has to walk a tight line between protecting rights on the one hand and keeping states on board on the other. Indeed, both the flexibility afforded to states in contexts of terrorist violence and the derogations system itself are reflections of international human rights law's commitment to what Gross and Ní Aoláin call 'accommodation' in crisis situations.<sup>56</sup> That said, there is a danger of effective protection of rights becoming sacrificed to accommodation. It is difficult to escape the feeling that this has happened if one takes into account the extent to which elements of counter-terrorist detention have been interpreted as compatible with international human rights law.

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<sup>53</sup> Special Advocates were introduced into the UK by the Special Immigration Appeals Commission Act 1997, s 6, and then included in the Anti-terrorism, Crime and Security Act 2001, the Prevention of Terrorism Act 2005, the Terrorism Prevention and Investigation Measures Act 2011, and the Justice and Security Act 2013.

<sup>54</sup> *Ibid* [220].

<sup>55</sup> See C Murphy, 'Counter-terrorism and the culture of legality: The case of Special Advocates' (2013) 24(1) *King's Law Journal* 19.

<sup>56</sup> Gross and F Ní Aoláin, above n 37.

Even without derogation states now administratively detain suspected terrorists — or place them in quasi-detention — for periods of time that seemed unimaginable when the ECtHR declared that four days of such detention was a violation of the ECHR in *Brogan v United Kingdom*.<sup>57</sup> With or without derogation, people are subjected to many years of detention (often offshore).<sup>58</sup> The review mechanisms available to them are deeply problematic either because of the difficulties detainees face in mounting a challenge (including due to the use of closed material) or because even a successful challenge cannot necessarily secure one's liberty. The former situation appears to be facilitated by human rights law, which is in danger of undermining the high premium it places on the availability of review by accepting highly irregular processes and inadequate legal representation as compatible with human rights law. The latter is in clear contravention of a proper understanding of human rights law. But the fact of such contravention is not sufficient to secure a liberty-enhancing change where states simply refuse to accept the applicability of international human rights law to the relevant circumstances, as is the case with the US.

State practice, as well as claims made to international institutions and human rights courts, show that states continue to push the boundaries of what is permissible. Where an internal challenge is mounted — which I defined above as an attempt to remain within international human rights law but to achieve a downward calibration of standards — that 'pushing' seems to be effective at expanding the boundaries, bringing more and more state action within human rights compatibility regardless of the pernicious effects it has on the enjoyment of liberty. Thus, while human rights law might be demonstrating its resilience by remaining relevant to contemporary counter-terrorist detention and asserting *some* control (especially over challenges to the lawfulness of detention), one is left wondering whether that resilience comes at the heavy cost of effectiveness in securing the enjoyment of rights.

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<sup>57</sup> (1988) 11 EHRR 117.

<sup>58</sup> Being held outside the territory of the state does not rid one of entitlements under international human rights law. Although primarily territorial, international human rights law is applicable to extra-territorial activities of a state where the state is in effective control over an area: ICCPR, art 2(1); UN Human Rights Committee, *General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add. 13 (26 May 2004); ACHR, art 1(1); *The Haitian Centre for Human Rights v United States* (1997) IACtHR, OEA/Ser.L/V/II.95 Doc 7; ECHR, art 1. For a general discussion see F de Londras, 'What human rights law could do: Lamenting the absence of an international human rights law approach in *Boumediene & Al Odah*' (2008) 41 *Israel Law Review* 562, 574–81. This has been affirmed in recent ECtHR decisions relating to UK troops' activities. See *Al-Skeini v United Kingdom* (2011) 53 EHRR 18 and *Al-Jedda v United Kingdom* (2011) 53 EHRR 23.